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Supreme Court, U.S.
FILED
AUG 12 1994
THE CLERK

No. 94-111

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

JED K. DETERS - - - - - - - Petitioner

versus

JUDICIAL RETIREMENT AND REMOVAL COMMISSION OF THE COMMONWEALTH OF KENTUCKY - Respondent

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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August 12, 1994

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QUESTION PRESENTED

Whether a Canon imposed by a State Supreme Court, which prohibits a candidate for judicial office from making statements which appear to commit the candidate with respect to issues likely to come before the court, infringes on the candidate's First Amendment rights.

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v.

JUDICIAL RETIREMENT AND REMOVAL COMMISSION OF THE COMMONWEALTH OF KENTUCKY - - - - - - - - *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondent, Judicial Retirement and Removal Commission of the Commonwealth of Kentucky (Commission), agrees that the facts of this case are relatively straightforward and not in dispute.

However, the Commission would like to distill the facts to those relevant to the Court's decision. The parties stipulated that the Petitioner, Jed K. Deters (Deters), was a candidate for election to the District Judgeship to the Sixteenth Judicial District of the Commonwealth of Kentucky, Kenton County, in November, 1991. Deters was unsuccessful in that campaign and at the time his matter came before the Commission, he was not a judicial officer or candidate for any judgeship.

The violations before the Commission were that on November 3, 1991, Deters' campaign treasurer caused a political advertisement to be run in the *Messenger* stating that Deters was "pro-life" candidate. The advertisement ran with the knowledge and approval of Deters.

The other violation was that on November 4, 1991, the campaign treasurer caused to be run in the *Kentucky Post* another advertisement which also stated that Deters was a "pro-life" candidate. This advertisement likewise ran with the knowledge and approval of Deters.

The Commission alleged that these proclamations of Mr. Deters' political views violated 4.020(1)(b)(v) and 4.3 of the Rules of the Kentucky Supreme Court.[1]

Deters stated at a formal hearing in this matter, held on September 23, 1992, that his advertisements referred to him as a "pro-life" candidate because "that was something that the public was concerned about." (R.4, Tr. p. 9). Deters further testified that he felt these advertisements

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[1]SCR 4.020(1)(b)(v) confers jurisdiction upon the Commission to impose sanctions for violation of the Code of Judicial Conduct, which is embodied in SCR 4.300. This Rule sets out the Canons, including Canon 7B(1)(c), which is challenged in this Petition. That provision of the Canon reads as follows:

> B. Campaign Conduct
>
> (1) A candidate, including an incumbent judge for a judicial office that is filled either by public election between competing candidates or on the basis of a merit system election:
>
> (c) should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court; or misrepresent his identify, qualifications, present position, or other facts.

did not violate the Canons because he made a decision that issues involving pro-life or pro-choice were not likely to come before him as a district judge. (Id., Tr. pp. 10-11).

Deters admitted in his testimony he did not feel his position on abortion had any relevance to his candidacy for district judge, but he made it a theme in his advertisements because people wanted to know and because the "general public" did not realize it had nothing to do with his candidacy. It was also brought out that the county of jurisdiction, Kenton, had a high percentage of Catholic voters and that the particular issue of abortion would be something that would be significant to these Catholic voters. (Id., Tr. pp. 19-20, 23, 21).

After the formal hearing and submission of briefs, the Commission, by final order dated February 1, 1993, ordered that Deters be Publicly Censured. The Commission addressed findings of facts and procedural issues and deferred the question of Deters' First Amendment rights to the Kentucky Supreme Court, however noting that the members of the Commission unanimously believed that Canon 7B(1)(c), on its face and applied to the facts in this case, is constitutional. (*See* Petitioner's Appendix B, p.20a).

Petitioner Deters appealed the Commission's decision to the Kentucky Supreme Court, which in a 5-2 decision affirmed the Commission's ruling in every respect, including the First Amendment argument which is before this Court.

REASONS FOR DENYING THE WRIT

The Petition for a Writ of Certiorari should be denied. Petitioner has not shown that the Kentucky Supreme Court has decided a federal question in a way that conflicts with a decision of another state court of last resort or a United States Court of Appeals, nor has he shown that the Kentucky Supreme Court has decided an important question of federal law which either conflicts with applicable decisions of this Court or should be settled by this Court, as required by Rule 10.1.

The Commonwealth of Kentucky should be allowed to govern the conduct of its judges and candidates for judicial office. A sufficient federal question has not been shown which would warrant intervention by the highest federal court in the land.

ARGUMENT

I. The Kentucky Supreme Court is Not in Conflict With United States Supreme Court's Decisions in This Area.

Contrary to Petitioners' argument in this regard, the Kentucky Supreme Court's decision, *Deters* v. *Judicial Retirement and Removal Commission*, Ky., 873 S.W.2d 200 (1994), is not in conflict with any of the cases he cited. Each case, from which Petitioner exacts one small statement or quote, is clearly distinguishable on its face. *Simon & Schuster, Inc.* v. *Members of the New York Crime Victims Board*, 502 U.S. ___, 112 S.Ct. 501 (1992), is the case where this Court struck down "Son-of-Sam" law enacted by the state of New York. This Court found that there was no state interest in limiting a victim's compensation to the proceeds of a convicted criminal's speech (in the form of books, etc.) about the crimes where the victims were injured. In that case, the statute was clearly designed to limit speech rather than to facilitate the compensation of

victims, and therefore unconstitutional. This case clearly has little relevance to the case at bar.

Petitioner also cites *Mills* v. *Alabama*, 384 U.S. 214 (1966), a case where this Court struck down a statute which prohibits soliciting votes on an election day. This case was a significant First Amendment decision because it involved a newspaper being charged with a crime for printing an editorial in favor of a referendum on the day of the election. Again, nothing in this decision affected speech allowed or disallowed by a candidate for any office, much less a judicial office.

Likewise, *Monitor Patriot Company* v. *Roy*, 401 U.S. 265 (1971), was a libel case against a newspaper and had nothing to do with prohibiting the speech of a candidate. Finally, Petitioner cites *Brown* v. *Hartlage*, 456 U.S. 45 (1982), which involved this Court's refusal to order a state to decertify the election of a candidate who offered to work for a lower salary than that allowed by statute. When the candidate found that this offer apparently violated a law against promising pecuniary gain to voters in return for their vote, he rescinded the offer. However, his unsuccessful opponent sued to have the election decertified because of the violation of the statute. An appellate court threw out the election, a decision reversed by this Court which held that the First Amendment would not allow misstatements of fact to give rise to absolute accountability. This Court held that this would be incompatible with the atmosphere of free discussion contemplated by the First Amendment. Again, this was not a judicial election, and this Court was deciding whether a far more substantial consequence, that being the decertification of an election and the disturbing of an electorate's valid decision, is appropriate when measured against freedom of speech. This case, like the others, is clearly distinguishable from ours.

II. Kentucky Has a Compelling Interest in Protecting The Integrity of The Judiciary, Best Served by Its Canon 7B(1)(C).

Petitioner, in his brief, repeatedly maintains that Canon 7B(1)(c) prohibits candidate speech. Obviously, this is not the case. The Canon only maintains that a candidate should not make statements that "commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." The Commission and the Kentucky Supreme Court have already made a finding of fact that cases related to the abortion issue are likely to come before the Kenton District Court, and that finding is not a subject of this Petition. The sole, narrow issue is, can a rule that prohibits a candidate from making statements that commit or appear to commit the candidate with respect to cases, controversies or issues likely to come before his court pass constitutional muster? Clearly, the First Amendment's protection is not absolute, and the answer is yes it can.

It is axiomatic, and even conceded in Petitioner's brief, that Kentucky has a compelling interest in protecting the integrity of the judiciary. *Morial* v. *Judiciary Commission of the State of Louisiana,* 565 F.2d 295 (5th Cir. 1977), citing *United States Civil Service Commission* v. *National Association of Letter Carriers,* 413 U.S. 548 (1973) and *Lubin* v. *Panish,* 415 U.S. 709 (1974); *Stretton* v. *Disciplinary Board of the Supreme Court of Pennsylvania,* 944 F.2d 137 (3rd Cir. 1991), citing *Cox* v. *Louisiana,* 379 U.S. 559 (1965).

This Court, in *Cox,* stated that a "state may also properly protect the judicial process from being misjudged in the minds of the public." *Id.* at 565. That principle is particularly important in our case. As stated in the Commission's statement of facts, Petitioner Deters admitted in his testimony at the formal hearing that he did not

feel his position on abortion had any relevance to his candidacy for District Judge, but made it a theme in his advertisements because the "general public" did not realize it had nothing to do with his candidacy. Petitioner admitted that the only reason he proclaimed his "pro-life" stance was because he was in a heavily concentrated Catholic district which he hoped would give him a distinct edge in the race. He specifically stated, "I mean, you're—you're in it to win. You do what it takes." (R.4, Tr. p.30). Deters' behavior is perfectly illustrative of why a state would have a compelling interest in narrowly restricting some part of judicial candidates' behavior.

Simply put, this Court has already recognized a compelling state interest in upholding the impartiality and integrity of the judiciary. *Buckley* v. *Valeo,* 424 U.S. 1 (1976). Petitioner actually misstates the Court's holding in *Buckley,* which upheld most of the restrictions in the law challenged in that case, striking down only limits on campaign expenditures as being violative of First Amendment privileges.

III. This Issue is Not an Unsettled Question of Federal Law, And Therefore This Court's Intervention in a Ruling of The Kentucky Supreme Court Is Unnecessary.

Petitioner maintains that this Court should grant Certiorari on this issue because the Court has not yet applied its precedents to judicial elections. However, guidance has been granted in other federal courts, and these courts have consistently ruled in favor of Canons identical to or similar to the challenged 7B(1)(c). *Morial* v. *Judiciary Commission of the State of Louisiana,* supra; *Stretton* v. *Disciplinary Board of the Supreme Court of Pennsylvania,* supra; *Ackerson* v. *Kentucky Judicial Retirement and Removal Commission,* 776 F.Supp. 309 (W.D. Ky. 1991) (upholding the exact Canon challenged here).

Cases cited by the Petitioner to the contrary, *Buckley* v. *Illinois Judicial Inquiry Board*, 997 F.2d 224 (7th Cir. 1993) and *J.C.J.D.* v. *R.J.C.R.*, Ky., 803 S.W.2d 953 (1991), dealt with a different Canon with different language altogether. In fact, the Canon dealt with in both of those cases had identical language. In *J.C.J.D.*, the Kentucky Supreme Court struck down the Canon as unconstitutional, and the present Canon 7B(1)(c) is the response to that decision, addressing the Kentucky Supreme Court's concerns.

Petitioner requests that this Court provide guidance, yet guidance is unnecessary in view of the consistent plethora of cases from other courts already in existence. Petitioner has not cited any cases dealing with a Canon with similar language to 7B(1)(c) which has been held unconstitutional; therefore, there is no conflict in the courts and no need for guidance from this Court.

This matter is one where a person is running for state court judgeship and the matter has been reviewed by a state commission, and the commission's decision has been affirmed by the state's highest court. "Guidance" is unnecessary and the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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